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## FEMINISM AND THE GENDER RECOGNITION ACT 2004

**ABSTRACT.** This paper argues, first, that the legal construction of transsexualism is a matter of interest, not only to members of the trans community, but to all students of gender, including feminists. The paper then proceeds to explain and analyse, using feminist perspectives, key aspects of the Gender Recognition Act 2004 in the light of the recent caselaw concerning the rights of trans persons. The 2004 Act, it is argued, is a conservative move, which attempts to deny the threat transsexualism poses to the binary system of gender, by instigating a system to formally ‘recognise’ only men and or women. However, the way in which the Act constructs the public/private divide and the mind/body relation carries potential for legal recognition of subject positions which may in a variety of ways be ‘beyond’ the binary system that is currently orthodox. The paper can as such be read as a case study in the legal (re)construction of gender, the gender/sex relation, and the widespread tendency to construct gender conservatively.

**KEY WORDS:** feminist theory, fluidity of gender, gender recognition, sex discrimination, social inclusion/exclusion, transsexualism

### INTRODUCTORY COMMENTS

The Gender Recognition Act 2004,<sup>1</sup> which introduces a regulatory scheme whereby a trans<sup>2</sup> person may apply for legal recognition that he or she has changed gender, received the Royal Assent on 1st July 2004.

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<sup>1</sup> Hereafter referred to as the “G.R.A.”. Similarly, I shall refer to the Gender Recognition Bill as the “G.R.B.”.

<sup>2</sup> Here, as elsewhere, terminology is political. In recent years activists have increasingly preferred the unifying term ‘transgendered’ to refer collectively to all those who challenge the conventional binary division of the sexes, seeing terms such as ‘transsexual’ and ‘transvestite’, etc., as problematic for their medicalised assumptions, their divisiveness, and their implicit endorsement of the binary system of gender. No term completely escapes this, however.

The Act is the result<sup>3</sup> of a long campaign<sup>4</sup> by trans people, and particularly the trans pressure group Press for Change, for legal recognition. Yet it is, I think, fair to say that feminists and other critical theorists of gender (and sexuality) have by and large tended to bracket transsexualism off as a minority issue with no particular wider resonances.<sup>5</sup> When transsexualism and the legal situation of trans persons is considered by feminists and other critical theorists of gender, 'we' tend to think in terms of how this or that legal development is seen by 'them'.<sup>6</sup> Here the trans community is figured to some extent as the feminist's fellow traveller, sharing a concern to challenge contemporary gender categories for their oppressive qualities. But this discourse also separates and distances, positing the 'trans community', and 'its' issues, as other to 'feminism'.

This in my view is unfortunate: the legal construction of transsexualism most certainly is or should be a feminist issue. In particular, to put the argument at its highest, the G.R.A., intentionally or otherwise, interrupts the orthodoxies of gender that law has peddled to a greater extent than any other development in recent times. To put it at its lowest, the Act invites all those who use these ideas (the concepts of 'gender', 'femininity' and 'masculinity') to rethink their use for their own purposes, and perhaps also to rethink their own

<sup>3</sup> The G.R.A., as will be seen, is far from being the last word on the topic of transsexualism in U.K. law; nevertheless, it constitutes a definite plateau in legal developments.

<sup>4</sup> The military metaphor is not my own. In the acknowledgements to his very useful text *Respect and Equality*, Stephen Whittle, a vice-president of Press for Change, thanks his fellow vice-presidents for having "fought alongside me at the barricades". He also thanks "the many ground troops" for their part in the campaign for respect and equality.

<sup>5</sup> Again, in his acknowledgements Whittle singles out a group of just five legal academics who in his view have explored the wider issues raised by transsexualism for the study of gender. One might feel that a couple of other people – notably Andrew Sharpe and Sharon Cowan – should be added to that list; but in any case Whittle's point is well made. This is probably also as good a place as any to point out that *F.L.S.* has been very much on the case regarding recent developments around transsexualism and law: see Sharpe (2002), Sandland (2003), Cowan (2004) and Bell (2004).

<sup>6</sup> We are all guilty of this at some level, and at some other level this is merely how we think; through the act of naming and the process of categorising. It is also a question of conceding to the other the respect which means that 'we' should follow 'their' lead when it is 'their' issue which is to the fore. This is the spirit in which I read Sharon Cowan's observation that the draft gender recognition bill published in 2003 "has been met with (mostly) positive views by the trans community" (2004, pp. 79–92 at 90).

purposes. The legal act of recognition of transsexualism can be read as a case study demonstrating the truism that any act of inclusion also excludes. It makes us question our own exclusions, and contemplate their cost. These concerns form a backdrop to my primary goals in this essay, which are, first, to inform about the content of the G.R.A., and, second, to consider possible 'feminist' responses to the Act. I do not claim any special authority to do this, and the purpose of the exercise is not to provide the last word on the issue, but rather to encourage feminists, whatever their perspective, to attend to the messages which are sent by the G.R.A. with regard both to strategy as well as to theory or the ontological status of gender as category.

#### THE GENDER RECOGNITION ACT 2004

##### *Legal Recognition I (or the Shift from Sex to Gender)*

The G.R.A. 2004, which responds to the judgments in *Goodwin v. U.K.* and *I. v. U.K.*,<sup>7</sup> supersedes that in *Bellinger*,<sup>8</sup> and confirms that taken in *A. v. C.C.W. Yorks*,<sup>9</sup> essentially has one purpose: to allow for the recognition by law of a transsexual person in an acquired gender identity. Section 9(1) provides that, on recognition,

the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)

The rather ungainly wording of the subsection partly reflects concerns voiced by the House of Lords and House of Commons Joint Committee on Human Rights (2003). In its draft form<sup>10</sup> the bracketed words were absent from the G.R.B. The Joint Committee was concerned that the judiciary might interpret the Act to mean that a change of 'gender' did not entitle that person, for example, to protection under 'sex' discrimination law in his or her acquired identity. It therefore recommended an addition to the text of the Bill, accepted by the Government (Department of Constitutional Affairs 2003, para. 7), to

<sup>7</sup> *Christine Goodwin v. United Kingdom* (Application no.28957/95) [2002] I.R.L.R. 664, [2002] 2 F.L.R. 487, [2002] 2 F.C.R. 577, (2002) 35 E.H.R.R. 18, 13 B.H.R.C. 120, (2002) 67 B.M.L.R. 199, *I v. United Kingdom* (Application no.25680/94) [2002] 2 F.L.R. 518, [2002] 2 F.C.R. 613 (E.C.H.R.).

<sup>8</sup> *Bellinger v. Bellinger* [2003] U.K.H.L. 21.

<sup>9</sup> *A v. Chief Constable of West Yorkshire Police* [2004] U.K.H.L. 21.

<sup>10</sup> See clause 5(1) of the Draft Bill published in July 2003.

make it clear that a change of gender is to be construed for all relevant legal purposes as a change of sex (House of Lords and House of Commons Joint Committee on Human Rights 2003, para. 112).

This general statement of recognition is backed up with detailed provisions in specific areas. Section 10 and Schedule 3 make provision for a person whose acquired gender has been recognised to obtain a birth certificate in that gender,<sup>11</sup> and thus the right to marry in one's acquired gender identity is assured by the Act.<sup>12</sup> Schedule 5 makes amendments to the law relating to benefits and pensions.<sup>13</sup> Although in general terms the policy of the Act is that recognition is not retrospective,<sup>14</sup> there are some limited exceptions. Thus, a post-recognition MtF trans person is to be assessed for the purposes of pension entitlement by reference to the rules, relating for example to working life span, applicable to women.<sup>15</sup> In cases where a FtM. trans person loses entitlement to gender-specific benefits, such as a Widowed Mother's Allowance, on recognition, he will then be entitled automatically instead to Widowed Parent's Allowance.<sup>16</sup> But the transition will not always work smoothly, and the Act creates dilemmas for some trans persons. For example, although an MtF trans person gains an entitlement to the pension rights applicable to women, by the same token a FtM. trans person aged between 60 and 64 will have to choose between recognition and losing his pension entitlements as a female.<sup>17</sup>

The Act reads, on one level, as a blunt, pragmatic and somewhat amoral response to the decision of the European Court in *Goodwin*: it

<sup>11</sup> The Act requires the establishment by the Registrar General of a register, to be called the Gender Recognition Register. This will detail persons granted a full G.R.C., who will then be entitled to a certified copy of a "birth certificate" in his or her acquired gender, and, by the terms of sched. 3, para. 6, "Where a short certificate of birth ... is compiled from the Gender Recognition Register, the certificate must not disclose that fact". Further discussion of the workings of the Register is beyond the scope of this paper.

<sup>12</sup> Section 11 and Schedule 4 amend the prohibitions on marriage contained in the Marriage Act 1949.

<sup>13</sup> A detailed examination of this complex sub-topic is beyond the scope of this paper.

<sup>14</sup> Section 9(2) provides that s.9(1) "does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those made or passed afterwards)".

<sup>15</sup> Sched. 5, para. 7(3).

<sup>16</sup> Sched. 5, para. 3(2).

<sup>17</sup> Sched. 5, paras. 7(2), 8(2), 9(2), 11, 14(3)(c).

merely implements that decision. In its detail it is dry and legalistic. But this belies the potentially momentous shift that legal recognition affects. Somewhere in the act or process of recognition, State and legal discourse shifts (in its own binarist terms) from sex to gender as the primary mechanism by which female and male are differentiated from each other. An on-going process of reversal is furthered by the G.R.A. In the 1960s, following de Beauvoir (1953/1972), gender was seen as subset of sex: 'sex' defined the parameters, 'gender' was the free play available within those parameters. After a period of interchangeability as between the two terms ('gender' and 'sex'), by the 1990s, following Butler (1993), amongst others, sex had increasingly come to be seen as a subset of gender, with the body (or 'biology' or 'nature' or 'matter' or any other, essentially discursive, or cultural, artefact) produced by gendered ideas and gendered actors. It is a distinctly Butlerian approach which has been institutionalised and generalised in U.K. law by s. 9(1) of the 2004 Act, in which 'gender' is the dynamic. 'Sex', if it is anything, is the product. This shift resonates at many levels. It is a movement from biology to sociology and psychology; from that which is given to that which is desired; from that which must be accepted to that which can be changed. These are, however, mere exemplars of the greater and more general point, which concerns a transition from an economy of certainties to something altogether more fluid. I shall return to this question presently.

*The Application for Recognition (or the Medico-Legal Reconstruction of the Normal, the Deviant, and the Unrecognisable)*

The application process is to be run by a system of "Gender Recognition Panels", with the duty to issue a "Gender Recognition Certificate" ("G.R.C."), if the relevant criteria are made out to the panel's satisfaction. Section 1(4) and Schedule 1 provide that such panels must comprise "legal members" and "medical members", to be appointed by the Lord Chancellor.<sup>18</sup> A legal member must be a solicitor or barrister of at least seven years standing.<sup>19</sup> A medical member must be either a registered medical practitioner or a chartered psychologist.<sup>20</sup> The Lord

<sup>18</sup> In consultation with the Scottish Ministers, for appointments in Scotland, or the Department of Finance and Personnel, for those in Northern Ireland.

<sup>19</sup> Section 71 Courts and Legal Services Act 1990 (see sched. 1, para. 1(3)(a), G.R.A.). The situation in Scotland and Northern Ireland is exactly the same: see paras. 1(3)(b) and (c) respectively.

<sup>20</sup> Sched. 1, para. 1(2)(b).

Chancellor must also appoint a President and Deputy President of the Gender Recognition Panels.<sup>21</sup> Each panel is to be presided over by the President or Deputy President, if present, or by the legal member, if not. Panels must sit in private,<sup>22</sup> determine applications without a hearing, unless the panel considers it necessary,<sup>23</sup> and gives reasons for the decisions reached.<sup>24</sup> Section 8(1) provides a right of appeal to the High Court<sup>25</sup> against a panel decision, but only by way of case stated. Judicial Review will also be available, and given that the human rights of the applicant are clearly at stake, an “intensive review”, of the type contemplated by the House of Lords in *R. v. Secretary of State for the Home Department, ex parte Daly*<sup>26</sup> should be undertaken.

The right to apply for recognition in an acquired gender is open to two constituencies. The first is persons of at least 18 years of age who are “living in the other gender”.<sup>27</sup> For those in this group, s.2(1) lists four criteria. An applicant must provide evidence that he or she:

- “has or has had gender dysphoria”,<sup>28</sup>
- “has lived in the acquired gender throughout the period of two years ending with the date on which the application is made”,<sup>29</sup> and
- “intends to continue to live in the acquired gender until death”<sup>30</sup>

Section 2(d) refers to s.3, which requires an application made under s.1 to include two medical reports, one of which must have been made by a doctor or a chartered psychologist with expertise in gender dysphoria<sup>31</sup> and must include a diagnosis of gender dysphoria.<sup>32</sup> If the applicant has gone, is undergoing, or will undergo gender reassignment treatment at

<sup>21</sup> Sched. 1, para. 2(1)(a) and (b).

<sup>22</sup> Sched. 1, para. 6(3).

<sup>23</sup> Sched. 1, para. 6(4).

<sup>24</sup> Sched. 1, para. 6(6).

<sup>25</sup> Or the Court of Session in Scotland. If successful the Court may make the order sought, or send the case back to the panel for re-consideration: s.8(3).

<sup>26</sup> [2001] 2 A.C. 532.

<sup>27</sup> Section 1(1)(a).

<sup>28</sup> Section 2(1)(a).

<sup>29</sup> Section 2(1)(b).

<sup>30</sup> Section 2(1)(c). An applicant is required to make a statutory declaration that the second of these two requirements are met: s.3(4).

<sup>31</sup> Section 3(1)(a), (b).

<sup>32</sup> Section 3(2).

least one of the reports, not necessarily that made by the gender dysphoria expert, must also include details of the treatments in question<sup>33</sup>. Given the rigidity of these criteria, the provision, by Schedule 1, para. 6(2), that panel decisions are taken by majority vote, and if there is no majority the presiding member has the casting vote, are likely to come into operation only rarely. On the grant of an application, a panel must issue a G.R.C.<sup>34</sup>

Section 27 provides for a fast track application process. Applications need only have one supporting medical report if the applicant has already lived for at least six years in an acquired gender identity at the date on which the Act comes into force,<sup>35</sup> and having undergone surgical gender reassignment is an alternative to a diagnosis of gender dysphoria.<sup>36</sup> This will be the only system in operation for the first six months, to allow long-standing transsexuals to be dealt with first, and will run alongside the permanent system for a further 18 months.

As can be seen, the G.R.A., as did the European Court in *Goodwin*, figures the human rights of trans persons as flowing from the medical construction of transsexualism as a mental illness.<sup>37</sup> As such, although the Act itself is ambiguous, applying to both the still-mad and the cured (“has or has had” gender dysphoria), the act of recognition is nevertheless posited as curative. Given that “disorder” implies some level of personal distress for the afflicted individual,<sup>38</sup> it has been suggested

<sup>33</sup> Section 3(2).

<sup>34</sup> Section 4(1).

<sup>35</sup> Section 27(4).

<sup>36</sup> Section 27(2).

<sup>37</sup> In formal terms, the Chair of any Panel will be a lawyer rather than a medical professional. However, all the evidence available concerning the operation of the Mental Health Review Tribunal system, which is similarly constituted, is that it is medical rather than legal discourses which dictate the outcome of tribunal applications.

<sup>38</sup> According to D.S.M. IV, the standard diagnostic manual, “There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis. There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is of the other sex (Criteria A). This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex (Criteria B). The diagnosis is not made if the individual has a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia) (Criteria C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criteria D)”.

(Whittle 2002, p. 20) that a well-adjusted trans person is outside the clinical definition. It is certainly the case that an individual defined as gender dysphoric who does not intend to cross and live in an acquired gender for life falls outside the legal regime for recognition, which hence also functions as a system of failure or refusal to recognise, in the process dividing the transgendered community from itself; the 'lifers' from the rest.

In short, the Act is constituted around a radical divide, an abyss as deep and wide as ever it was, between conformity and deviance, or self and other. In fact, as thinkers from Freud to Derrida to Irigaray have recognised, the binary system (which posits its own function as the regulation of desire) operates as a binary within a binary, and comprises three, not two elements; namely, the acceptable, the unacceptable and the unthinkable (or, here, the unrecognisable). The binarism acceptable/unacceptable (self and other, normal and deviant) is itself structured as against that which is not merely unacceptable but unthinkable: [acceptable/unacceptable]/unthinkable. In the case of the G.R.A., then, my argument is that legal recognition has two functions. First, through recognition, it renders the unacceptable acceptable (desire here works as recuperation). Secondly, at the same time, it remainderers that which is not merely unacceptable but unthinkable (desire works here as denial): this latter being, to give it a name, any gender identity between, above, below, and most significantly beyond, the desire for lifelong gendered conventionality. Such possibilities of being are the unrecognisable beyond to the horizons constructed by the 2004 Act.

Fear of the other, and the inability of the U.K. to control the law and practice of recognition abroad, also underpins the regulation of the second category of eligible applicant, which comprises persons, again of at least 18 years of age, who have "changed gender under the law of a country or territory outside the United Kingdom".<sup>39</sup> A change of gender outside the U.K. will not be recognised automatically,<sup>40</sup> nor will any marriage that such a person has entered into in an acquired gender.<sup>41</sup> Such individuals will still have to apply to a Gender Recognition Panel in order to be recognised in an acquired gender identity in the U.K.<sup>42</sup>

<sup>39</sup> Section 1(1)(b).

<sup>40</sup> Section 21(1).

<sup>41</sup> Section 21(2). If and when a full G.R.C. is granted, any marriage that was previously void will be retrospectively validated: s.21(3).

<sup>42</sup> Sections 1(1)(b), 1(2)(b), 1(3).

The requirements of s.3 apply to such applicants.<sup>43</sup> The panel must also be satisfied “that the country or territory under the law of which the applicant has changed gender is an approved country or territory”.<sup>44</sup> The Government is currently busy compiling a list of such approved locations, and “To go on the list, a country will need criteria as rigorous as those in the [G.R.A.]”.<sup>45</sup> The intention is to prevent gender reassignment tourism: “We want to ensure that the standards in other countries are the same as those we apply here. We also want to make sure that we do not create a position whereby people who cannot get a gender recognition certificate here apply abroad to fulfil the criteria”.<sup>46</sup> This, once removed, is the self-same process, now at the macro level or the level of States, of excluding the unthinkable through recuperating the unacceptable (recognising it as acceptable) and jettisoning the unthinkable, that the system of recognition performs at the micro level.

*Legal Recognition II (or the Shift from Gazing at Bodies to Accepting that Things Are (Not) What They Seem)*

It is misleading to say that the G.R.A. merely implements the decisions of the European Court in *Goodwin* and *I*. The European Court was not overly prescriptive as to how its judgements should be implemented by the U.K. Government. And the G.R.A. does in fact go further than strictly required by the European Court, in that entitlement to recognition is not limited by the G.R.A. to so-called ‘post-operative’ trans people:<sup>47</sup> that is, those who have undertaken highly invasive surgery and undergone other significant medical interventions in order to modify genitalia and secondary sexual characteristics such as voice and body hair in order more closely to approximate the individual’s desired morphology. As seen above, the Act’s requirement is for a diagnosis of gender dysphoria, and there are no requirements that an applicant undergo any reconstructive surgery or other intervention. In other

<sup>43</sup> Section 2(2)(b).

<sup>44</sup> Section 2(2)(a).

<sup>45</sup> G.R.B. Standing Committee A, H.C. Hansard, 9 March 2004, Col. 59.

<sup>46</sup> David Lammy M.P., Parliamentary Under-Secretary of State at the Department for Constitutional Affairs, Second Reading Debate, 23 February 2004, H.C. Hansard Col. 56.

<sup>47</sup> All the relevant case law (with the exception of *Croft*, discussed below), both in the U.K. and before the E.Ct.H.R., and elsewhere, concerns post-operative trans people. Many countries require reassignment surgery as a condition of recognition, including France, Belgium and Sweden.

words, the G.R.A. does not defer merely to medicalism in a broad sense, but specifically to the 'psy' discourses; psychiatry, psychology and psychoanalysis. It is the mind, not the body, which is the prime site for medicalised intervention in the scheme adopted by the Act. That which is hidden from view, clothed, namely sexual organs, etc., is, of itself, irrelevant. This means that the G.R.A. is prepared to license, as female, persons with functioning male sexual organs and, as male, persons with functioning female sexual organs.<sup>48</sup>

If one is of the view that the point of law is to give recognition to the reality that individuals actually inhabit, then the decision to take an expansive approach to this aspect of the question of who is entitled to recognition is welcome, as is the lack of further invasive requirements such as the need to be sterile in order to be recognised.<sup>49</sup> But law does not merely 'recognise' reality (or not); it also constructs it, and it is important to be aware of precisely what is constructed by the G.R.A. at this point, which is a radical divide between the public and the private. The G.R.A. is concerned with a public politics of the presentational, the proper appearance of the gendered body, which trades only in that which is on public display, the various visible signs and indicators of gender identity that figure the interaction of gendered individuals. That which is below the surface, here the body of the person in question,<sup>50</sup> is deemed beyond the sphere of public regulation. Yet the body, too, even the medical or clinical body<sup>51</sup> (for example the chromosomal body), is figured as mere surface or psychic construction, within which is the truth of the individual, the gendered psyche. So, the public/private is daisy-chained with the Kantian mind/body split. The consequence of this is that, for the purposes of the governmentability of gender, the body, and its biology, does not exist. The Act is an example of State strategy which operationalises the view that 'gender' is the government of minds not bodies. Alternatively, it could be said that the public/private divide in this schema is used

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<sup>48</sup> It is for this reason that s.20 provides that a person recognised in an acquired gender can nevertheless be charged with a gender-specific sexual offence in his birth gender: the law in Scotland and Northern Ireland continues to define rape as a gender specific offence.

<sup>49</sup> As in many jurisdictions, including Germany, Denmark, and the Netherlands.

<sup>50</sup> The publicly gendered individual assumed by notions such as 'living in the other gender' is always clothed, always presented for respectable public consumption. The publicly gendered individual is never naked.

<sup>51</sup> The medically gendered individual, by contrast, is always naked.

strategically to construct an overlying divide between appearance and materiality. Such an opposition is, however, deconstructable.<sup>52</sup> Appearance (psychic projection, psychic interpretation) depends on materiality, on both a surface and a sub-surface on which to project. Moreover, appearance already is material. Like bodies, appearances too (are) ‘matter’. Appearance and matter in this sense depend on each other.

It was this aspect of the Government’s proposals for recognition that so upset conservatives. Lord Tebbit attempted to reinstate some version of the orthodox relation between appearance and materiality. Moving an amendment to the draft of the G.R.B. as it passed through the House of Lords in the early months of 2004, which would have prohibited a marriage involving two persons both of whom possessed XX or XY chromosomes, he said:

I beg the Government to see the world as it is. There is something absurd in the proposition that the problems – I accept that they are real problems – of transsexual people require us to accept that while today the marriage of two people each bearing the chromosomes and the sexual organs of the same sex would be a same-sex marriage and therefore illegal, a piece of paper that declares one of those two people to be of the opposite sex would be permitted by this legislation to make it a legal marriage of opposite sexes.<sup>53</sup>

Although my perspective differs from that of Lord Tebbit, it has to be conceded that he has a point. The G.R.A. is made from the same cloth from which was cut the Emperor’s New Clothes. Lord Tebbit further pointed out that Government policy is not to allow same sex marriage, and yet the G.R.B. (now the G.R.A.) allows two persons both of whom had given birth to children (“and I can think of no better test of whether a person is female than that”<sup>54</sup>) to marry. Such a couple could also, under the terms of the G.R.A., both continue to produce further children following their marriage. It might be objected that an FtM transsexual who continued to engage in sexual activity as a female would not satisfy the criteria for recognition. In particular, it might be thought that such a person, even if suffering from gender dysphoria, could not be said to have “lived in the acquired gender throughout the

<sup>52</sup> This, at least on one reading, is the central thesis of Butler’s highly influential *Bodies that Matter* (1993).

<sup>53</sup> House of Lords, Hansard, 3 February 2004, Col. 618.

<sup>54</sup> *Ibid.*

period of two years ending with the date on which the application is made”, nor to “intend to continue to live in the acquired gender until death”. But if the only evidence that he or she did and does not, respectively, is his or her sexual practices, then that is poor evidence, and demonstrates how a normative heterosexual perspective trips over its own assumptions.<sup>55</sup> In *Goodwin* and *I.* the European Court made great play of the fact that the two applicants, both MtF transsexuals, self-identified as heterosexual female, “live as a woman, is in a relationship with a man and would only wish to marry a man”.<sup>56</sup> In *Bellinger*, that Mrs. Bellinger wished only to marry a man was patently true, after more than two decades of marriage to Mr. Bellinger. But this is by no means always the case. A transsexual person may be straight, gay or bi-sexual, both before and/or after having transitioned from one gender to the other.<sup>57</sup> It is perfectly possible that an individual might self-identify as male but possess female genitalia and have sexual intercourse with a man.

This perhaps is a moment of beyondness woven into the fabric of the G.R.A. The Government’s, essentially reactionary, attempt to ensure that the binary system of gender is able to continue in the face of individuals transitioning from one to the other, has also spawned the possibility of legally validated subject-positions which, by any conventional understanding, undermine or depart from that binary

<sup>55</sup> Sharpe (2002a, p. 33) reports research which indicates that transsexuals, aware of the norms and strictures of the clinical discourse on transsexualism and its treatment, can be less than candid regarding sexual history and sexual preference when seeking medical intervention, because the desire for heterosexual normality is seen as a clinical indicator of suitability.

<sup>56</sup> See *Goodwin*, *supra* n.7, para. 101, *I. v. UK*, *supra* n.7, para. 81

<sup>57</sup> The following is Henry Rubin’s account of the 22 FtM research subjects in his study of identification and embodiment of transsexual men: “Thirteen men describe lesbian careers which preceded their FtM identification. Seven men say that they never identified as a lesbian. Of those who had lesbian careers, six men claimed that they are sexually attracted to women. They categorise themselves as heterosexual men or as queer-identified heterosexual men. Four of these ex-lesbians also switched their object-choice over the course of transition and now identify as gay men. One now identifies as bisexual. A twelfth man who prefers women would not discount the possibility of having gay sex with another FtM. Finally, one abstains from sex for the most part, though he thinks of himself as heterosexually oriented. Of the seven who do not have a lesbian career, two are homosexual (male sexual object choice) and three are heterosexual (female sexual object choice). Two are bisexual. One of the heterosexual men switched his object choice over the course of transition, from male partners before transition to female partners after transition” (Rubin 2003, p. 7).

mode of categorising. Lord Tebbit sees this as a denial of reality. I think things are more complex. The denial of the complexity of social reality on the part of the Government has punitive consequences for some, but might allow real freedom, a lived reality of the deconstruction of the dyads male/female, conformity/deviance, for others. In ontological terms, the G.R.A. marks a new openness of texture, a new fluidity, to the legal construction of gender.

*Between Recognition and Non-Recognition (What Happens if a Transsexual Person has Married in a Birth Gender? Or, When the Public and the Private Overlap?)*

One group for whom the G.R.A. has punitive consequences are trans persons already married in their birth gender, their spouses, and other members of their families. A married person who applies successfully for a G.R.C. is not entitled to a “full” G.R.C. but instead to an “interim” G.R.C.<sup>58</sup> An interim certificate recognises that the applicant has changed gender, but gives him or her no entitlements as a member of the acquired gender. In effect, such a person is recognised but that recognition is put on hold. A person in possession of an interim G.R.C. has several options. He or she may take no further steps, in which case, the recognition of his or her acquired gender identity is of only symbolic value. This may be enough for some people. He or she may apply, and must do so within six months,<sup>59</sup> to a court for a decree of nullity of marriage<sup>60</sup> on the ground that an interim G.R.C. has been issued, and if the decree made the court must then issue a full G.R.C.<sup>61</sup> If the marriage is ended in any other way – that is, by divorce, annulment, or the death of the other spouse – again, within six months of the interim G.R.C. being issued, then the person in possession of the interim certificate may, but must within six months, apply to a Gender Recognition Panel for a full certificate.<sup>62</sup>

This means that a happily married trans person and his or her spouse must choose between the continuation of their marriage and the legal recognition of the acquired gender identity of the spouse in question. There are also practical and financial as well as emotional consequences

<sup>58</sup> Section 4(3).

<sup>59</sup> Sched. 2, para. 4(1), adding a new para. 3A to Sched. 1 of the Matrimonial Causes Act 1973.

<sup>60</sup> Or in Scotland, for a divorce.

<sup>61</sup> Section 5(1).

<sup>62</sup> Sections 5(2), (3).

to a State-ordered divorce. Spousal pension entitlements, for example, often end on divorce. Clearly, there is an arguable breach of Articles 8(1) and 12, either alone or in conjunction with Article 14, of the E.C.H.R. The Joint Committee on Human Rights argued the point, also made by others such as Press for Change, that such a choice was invidious; that if the Government was set on this course it should at least pick up the financial costs of imposing divorce on happily and lawfully married couples; and that the legal and other financial consequences of forced divorce could be ameliorated if the G.R.A. was dovetailed with the proposed Civil Partnerships regime, so that forced-divorced couples could register their partnership immediately on being divorced (House of Lords and House of Commons Joint Committee on Human Rights 2003, p. 29). In its response, the Government undertook to take account of couples seeking the recognition of a civil partnership following divorce (at best a loosely defined commitment), but made no direct reference to the suggestion that the State should foot the cost of forced divorce, nor would it undertake to delay the introduction of the interim G.R.C. until civil partnerships were legislated for: "it will be for a married transsexual person to decide whether to wait for the implementation of civil partnerships or whether to seek gender recognition as soon as the Gender Recognition Panels are in place".<sup>63</sup>

There are various points that can be made about the interim G.R.C. First, it is cruel, to a small group of persons.<sup>64</sup> Secondly, the reason that it is cruel to a small number of persons is that the Act is concerned with the recognition of gender identity in the public sphere, and its desire for (the appearance of) gendered conformity in public is such that the private-sphere perceptions, of self and place, of this small group of individuals must be sacrificed to the Government's non-negotiable

<sup>63</sup> Department of Constitutional Affairs (2003, para. 15). David Lammy later explained that it was the Government's intention "to make it possible for a couple to end their marriage, for the full gender recognition certificate to be issued, and for a civil partnership to be formed, all on the same day" Second Reading Debate, HC Hansard, 23 February 2004, Col. 54. It may still be possible that the G.R.A. will dovetail with civil partnership legislation, either from, or from soon, after implementation of the G.R.A. The Civil Partnership Act 2004 has now received the Royal Assent. Much depends on the speed with which the G.R.A. and the Civil Partnerships Acts can be up and running. But such dovetailing equally may well not be available to applicants for some time, particularly those who wish to take advantage of the fast-track procedure which will operate for the first two years of the G.R.A.'s existence.

<sup>64</sup> Estimated by Mark Oaten, Liberal Democrat MP for Winchester, at 150–200 individuals, H.C. Hansard, 23 February 2004, Col. 69.

requirement that marriage is to be reserved for heterosexual couples. Thirdly, although in broad terms the public/private divide as constructed in the context of marriage and the interim certificate is consistent with the public/private divide as constructed in the context of the criteria for recognition, as in both cases it is the maintenance of the public appearance of gendered conformity which dictates the Government's stance, its effects are differentiated by context. In other words, individual morphology is, as seen above, constructed as wholly private and hence beyond regulation by the G.R.A. whereas the public character of the manner in which bodies are linked into chains by law<sup>65</sup> means that the private elements of such State-recognised relationships are overridden on grounds of public interest. One body can be left alone. The conjunction of bodies requires legal (moral, etc.) regulation. There is, nonetheless, something surreal about the Government's dogmatic approach on this point when it is prepared, at least from the point of view expressed by Lord Tebbit, to recognise marriages involving couples of the same (birth) sex.

#### *Gender Discrimination*

During the passage of the G.R.B. various actors, including the Joint Committee, recommended that the G.R.A. be used to bring the entirety of sex discrimination law into line with the spirit of *Goodwin*.<sup>66</sup> However, this suggestion was rejected by the Government, on the basis that "the Government's view is that this Bill is specifically about gender recognition. It is not about wider issues of discrimination relating to transsexual people".<sup>67</sup> Accordingly, s.14 and Schedule 6 of the G.R.A. amend the Sex Discrimination Act 1975, but only to the limited extent of disapplying the justifications for discrimination on grounds that sex (gender) is a genuine occupational qualification to those in possession of a full G.R.C. The fact that such an individual will also be able, if

<sup>65</sup> And this applies equally to the status of parents: see s.12.

<sup>66</sup> Following the decision of the European Court of Justice in *P. v. S* [1996] I.C.R. 795, the U.K. amended sex discrimination law as it applied to employment and vocational training, but not otherwise. The Committee recommended that the spirit of *P. v. S* should apply across the spectrum of sex discrimination law, and therefore should apply equally to discrimination in the context of housing, education and the supply of goods and services (paras. 100–103).

<sup>67</sup> David Lammy MP, Second Reading Debate, H.C. Hansard, 23 February 2004, Col. 57.

required by an employer, to produce a birth certificate that reflects his or her acquired gender will also be a practical help.<sup>68</sup> Nevertheless, the G.R.A. offers no new protection from discrimination for transsexual persons who have not yet been legally ‘recognised’ (in respect of whom *Croft*, discussed below, appears to continue to represent the law), nor is there for ‘recognised’ transsexuals in the other areas covered by sex discrimination law; housing, education, and access to goods and services.

Discrimination is also permitted by the G.R.A. in other areas. Section 19 gives sporting bodies powers to “prohibit or restrict” the participation of trans competitors in an acquired gender identity in a “gender-affected sport”<sup>69</sup> on grounds of securing either “fair competition” or the “safety of competitors”.<sup>70</sup> Lobbying by the Church secured a right of conscientious objection to marriage involving a person in an acquired gender identity, so that a clergyman is not obliged to solemnise a marriage if he “reasonably believes that the person’s gender has become the acquired gender under the Gender Recognition Act 2004”.<sup>71</sup> The Lord Chancellor, Lord Falconer, has said that as the G.R.A. offers no new legal protection to transsexual people in the context of religious organisations, he and the Government are “therefore of the firm view that any actions brought against churches would not succeed”,<sup>72</sup> but it is at least arguable that churches are public authorities when conducting marriages,<sup>73</sup> and so the Convention rights to marry and to privacy may be capable of being used to challenge any exclusionary policy by a church in this respect, although there is of

<sup>68</sup> Lynne Jones M.P., Second Reading Debate, H.C. Hansard, 23 February 2004, Col. 93.

<sup>69</sup> Section 19(4) defines a gender-affected sport as one in which “the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport”.

<sup>70</sup> A particularly opaque provision.

<sup>71</sup> Schedule 4, para. 3, inserting a new s.5B into the Marriage Act 1949. Elements within the Christian lobby, such as the Evangelical Alliance and the Christian Institute, were vocal in their opposition to the G.R.B., although others were broadly sympathetic to the Bill (see for example the views of the Metropolitan Community Church of Manchester, offered to the Joint Committee and cited also in the Second Reading Debate by Shaun Woodward, H.C. Hansard, 23 February 2004, Col. 75).

<sup>72</sup> Personal correspondence from Lord Falconer to Colin Hart, Director of the Christian Institute, and published on the Institute’s website, [www.christian.org.uk](http://www.christian.org.uk).

<sup>73</sup> This was the expressed view of Jack Straw M.P., when Home Secretary, when discussing the scope of the Human Rights Act 1998, see H.C. Hansard, 20 May 1998.

course Article 9's right to religious freedom to be pleaded in support of any such church policy.

#### FEMINIST PERSPECTIVES?

The G.R.A. must be seen in its context. Although concerned specifically and narrowly with the rights and interests of transsexuals, the Act is also one of a raft of legal changes which, taken together, seem to undermine that which was previously, and very recently, seen as the unchallengeable orthodoxy of the legal construction of gender in the U.K. and elsewhere. As Collier has put it:

Within the conditions of late modernity the underlying normativity of a gender regime/order which had hitherto framed the encoding of the 'familial' as, *a priori*, heterosexual within family law is itself...in some key respects now being subverted and brought into question. Heterosexuality, for so long the taken-for-granted epistemic context in which discussion of family law has taken place, appears increasingly as a contested, contingent and fluid phenomena. (Collier 2000, p. 164)

Collier's point is as applicable to gender categories as to sexuality categories: heterosexuality as a normative system of sexuality is also a measure of the relation between the (two) genders. Sexuality in this sense depends conceptually on gender for its range of meanings, permissions and exclusions. Moreover, Collier's point is not limited to family law. The G.R.A. is itself tangible evidence of that. As I have argued it is concerned primarily with public appearances, and only incidentally with the regulation of the private sphere of family life. Moreover, although the Act deals with familiar themes and topics – the construction of the body, and of gender, marriage, and the public/private divide, as well as rights in the context of employment, pensions and benefits – the familiarity of that territory is upset by the G.R.A. The Act destabilises the core concept, of gender as an oppositional category, and this, I would argue, has implications for feminist scholarship in law.

I am thinking here in particular of a liberal feminist perspective, or the view that equality of treatment of the sexes by law is the goal of feminist interventions. This seems, in the present context, to entail the same reversion to binary opposites that is engineered

by the G.R.A.<sup>74</sup> and the courts. Both the European Court of Justice<sup>75</sup> and the House of Lords<sup>76</sup> have held that equality means treating a transsexual person as a *bona fide* member of his or her acquired gender category and judging the fairness of his or her treatment on that basis. Equality, in other words, is inherently conservative, and is unable to move beyond binarism. Indeed, the G.R.A. and the caselaw actively recreate the binary division.

Moreover, the equality approach falters in the face of ambiguity. A case in point is *Sarah Croft v. Royal Mail Group Plc*. Despite the fact that the UK's response to *P. v. S* – the Sex Discrimination (Gender Reassignment) Regulations 1999 – amended the Sex Discrimination Act 1975 so that s.2A of that Act now prohibits direct discrimination in employment, which is deemed to have occurred if an employer, A, treats an employee, B “less favourably than he treats or would treat other persons, and does so on the ground that B intends to undergo, is undergoing or has undergone gender reassignment”, the Court of Appeal in *Croft* held that there was no discrimination against a MtF transsexual in the process of transitioning, who had been barred from using both the female toilets (as not yet sufficiently female) and the male toilets (as no longer sufficiently male) in her workplace, with the consequence that she was required to use the disabled person's toilet.<sup>77</sup>

What would it mean to treat a person in Ms. Croft's position “equally”? At the very least cases such as this require that equality be rethought. Equality measured as equal treatment of men and women cannot compute this situation. In *Croft*, Jonathon Parker L.J. held that the comparator when assessing alleged discrimination against a transitioning (as opposed to post-operative) transsexual is “employees of the respondent (whether male or female)”,<sup>78</sup> but that did not lead to a conclusion that there had been discrimination, because the

<sup>74</sup> See s.14 and Sched. 6, amending the Sex Discrimination Act 1975. See also the Explanatory Notes which accompany the Act, which explain that “A person who has been recognised in the acquired gender under the Gender Recognition Act will... necessarily be considered to be undergoing or to have undergone gender reassignment within the meaning of these enactments and accordingly, discrimination against him or her on this ground will be unlawful”.

<sup>75</sup> *Supra* n.67.

<sup>76</sup> *Supra* n.9.

<sup>77</sup> *Sarah Croft v. Royal Mail Group plc* [2003] I.C.R. 1425. I note in passing that this case also raises significant questions about the construction of disability as other.

<sup>78</sup> Paragraph 74.

requirement that Ms. Croft be required to use the disabled person's toilet did not amount to "less favourable" treatment than that of male or female employees. So, the court recognised the third sex – neither properly male nor female – but that recognition is figured through a discrimination law which is unable to compute it. Equality, it seems, can only work as discrimination against that or those outside its binary terms of reference.

There are complex patterns at play here. As argued above, the G.R.A. is prepared to licence what, by orthodox understandings of gender as a rigid either/or (pre-operative/post-operative) opposition, is an individual in permanent transition, neither fully one or the other (the individual who seeks recognition in an acquired identity but who has no intention of undergoing genital reconstruction surgery). Hence, it is the situation in *Croft*, rather than that in *Goodwin, I., Bellinger* or *A. v. West Yorks* (all of which involved so-called 'post-operative' transsexuals) which the Act generalises.<sup>79</sup> But the Act does not follow Jonathon Parker L.J. in his view that the transitioning transsexual is neither male nor female: instead it forces that messy reality back into the binary model. In consequence, the Government, and the law, finds itself in the position of 'recognising', through a structured and self-conscious denial, men with vaginas and women with penises, and indeed a whole range of gendered identities and individual morphologies. This is the nub of Lord Tebbit's objection. I find it an exciting prospect, for precisely the same reason: it undermines the neatness of the division between the sexes (although where Lord Tebbit sees biology I see ideology, or 'biology' as ideology). But my point here is that 'equality of treatment' fails not only to provide a satisfactory perspective on the G.R.A.: it fails even to provide the conceptual tools by which any perspective could be arrived at,

<sup>79</sup> The requirement of s.2(1)(b), that an applicant must have lived as a member of the gender to be acquired for two years immediately preceding the application for a G.R.C. is a reference to the "real life test" that transsexuals are required to undergo as part of the treatment for gender identity disorder. The clinical supposition is that at the end of the real life test the individual concerned, if "successful" will be eligible for gender reassignment surgery. This supposition is also built into the Act, to the extent that only individuals who can provide medical evidence of successful completion of their real life test by the time of the application for a G.R.C. will be eligible to apply. But as the G.R.A. makes no requirements in respect of surgery, the end-point to the period of transition is effectively absent from the Act. The "inbetween" (in clinical terms) is deemed a full member of his or her acquired gender (in legal terms). The Act, in other words, does not generalise (only) the fully transitioned, but also (in the terms of its own binary logic) the permanently in transition.

because it is tied into the binary logic of equality as between two, and only two, relevant groups.

There is certainly a strand of thought within radical feminism, with its preference for difference over equality, which is hostile to (Mtf) transsexualism, particularly when the person who has transitioned self-describes as a lesbian or lesbian feminist. Such individuals are claimed to represent a threat to and intrusion into the hegemony of women. Janice Raymond for example argues that the mere existence of a Mtf transsexual “is a masculinist violation of bodily integrity. All transsexuals rape women’s bodies by reducing the real female to an artefact, appropriating this body for themselves” (1998, p. 308). In similar vein, Sheila Jeffreys argues that MtF lesbians can never successfully occupy the subject position they aspire to because:

The male-to-constructed-female ‘lesbian’ has most frequently been heterosexual in his preoperative state. He related to women from the sex-class position of manhood whereas lesbians, in the subordinate sex class, have chosen to love women like themselves. It would be difficult to imagine how two such different experiences could be confused. (1996, p. 84)

Radical feminists have put these views into practice, the most well-known example perhaps being the confrontation between the organisers of the Michigan Womyn’s Music Festival and Transsexual Menace, a Mtf lesbian activist group, barred from the Festival on account of their male birth gender, who responded by setting up Camp Trans at the Festival entrance and eventually were allowed to attend (see Califia, 1997). In the context of the G.R.A., which also requires the opening up of hitherto ‘womyn-only’ space to transsexual persons, it is clear that this version of feminism finds the idea of legal recognition, and the rights that go with it, provided by the G.R.A. as antithetical.

It may well be that the approach taken by Raymond and Jeffreys (and others such as Mary Daly) is a minority one, even within radical feminism. Nevertheless, I would argue that the obsession with difference as opposition is little more use than the liberal’s obsession with equality. In and because of their desire to preserve an authentic and (to men) unknowable feminine experience, Raymond and Jeffreys refuse to recognise the broader implications of transsexualism. It is not just that gender really *is* a fluid category at the level of the individual, who may cross from one to the other, but that the

categories themselves are always already fluid. These writers are caught by their own arguments. Jeffreys for example is scathing of the “belief of transsexuals in a mysterious female essence, which has inconveniently located itself in their bodies” (1996, p. 84). This is a valid point, insofar as the claim of the transsexual is to know that one is what one is not, which implies that one knows the substance, the feeling of being or experiencing, that which one is deprived of, which does not seem to be possible. Hence, in Jeffreys’ view, the MtF trans person cannot but be motivated by a psychic projection, from a male standpoint, of what it means to be a woman.

But the terms in which she makes her argument are the same as those she criticises, and this is because her assessment of the role of ‘essence’ in transsexualism is deficient. Transsexualism, conceived as the search for essence (of self, of gender identity) functions as a double movement (Sandland 1998). The search for essence, the putting of ‘essence’ into play as a motivating dynamic for gender reassignment, is also and simultaneously the denial of essence: this is inherent in the notion of crossing from one gender to the other. Yet Jeffreys cannot register the transsexual’s denial of essence: the MtF transsexual is essentialised as male in her reading. The radical perspective, based on the idea of a shared, universal, and *singular*, truth cannot, it seems, accommodate transsexualism in its second incarnation – as anti-essentialist – and hence it lacks the tools to explore the idea of anti-essentialism (and its relation with essentialism) further. Like liberalism, radicalism proves to be an exclusionary project, geared towards the protection of the boundaries between one gender and the other. It does not seem even to be interested in the FtM situation, through which, in its terms, women are able to appropriate the corporeality of the male subject. Surely, this should be an issue of interest to feminists?

It is my argument, therefore, that transsexualism illustrates the need for feminism to start somewhere beyond equality and beyond binary difference. In their own ways, liberalism and radicalism conspire with the G.R.A.’s fantasy of gender as ‘either/or’ and the suppression of what might be beyond that register. So too does transsexualism, in its conservative incarnation, that is to say when the dynamic movement of transsexualism is portrayed discursively as delimited by the binary structure of gender: where transition is an act of crossing, not of moving beyond. But at the same time transsexualism is a destabilising force, acting on the binary logic of gender, “resisting and disorganising it, without ever constituting a third term” (Derrida 1981, p. 43). This is what can be glimpsed in *Croft*,

and what has been allowed by the G.R.A.: a beyond in which gender is either meaningless in social or psychological terms, or is figured as choice not prison, as self-expression not prescription. A feminism which can analyse and capitalise on these developments must avoid dogmatic attractions to concepts which resonate with the assumptions of binarism, and resist any attempt to decide whether transsexualism is “really” to be seen as *either* a positive *or* a negative feature of the contemporary landscape of gender. Instead, the questions are empirical and investigative: what precisely are the positive and negative implications of, in this case, the G.R.A.? What does it block and what does it allow, and does it do this successfully? What does it say about the contemporary construction of gender by law? Such questions are as relevant to feminists, and their constituents, as they are to transsexual activists. This essay has not attempted systematically to tackle these questions, but it has, I hope, made the case that these are the questions that should be asked.

#### CONCLUDING COMMENTS

If the aim of the G.R.A. is to provide the conditions in which an act of crossing is not only legally possible but also private and invisible, then it only imperfectly achieves it. Section 22(1) does make it a criminal offence “for a person who has acquired protected information in an official capacity to disclose the information to any other person”, except in limited circumstances,<sup>80</sup> but the Government also accepted that it could not outlaw “all rumour and gossip”.<sup>81</sup>

Nor does the G.R.A. attempt to sever every link between the new identity and the old. For example, although provision is made for birth certificates which reflect a person’s acquired gender identity to be available, whether other equally important documents, such as those confirming educational qualifications will be available in an acquired gender identity will be in the discretion of the issuer of the documents in question. Imperfection on this front is, however, only to be expected: “It is nonsense to try and throw a veil of secrecy, enshrined in law, over the past, suggesting that one can rewrite it or wipe it out”.<sup>82</sup> On a

<sup>80</sup> Section 22(3).

<sup>81</sup> David Lammy, Second Reading Debate, H.C. Hansard, 23 February 2004, Col. 55.

<sup>82</sup> Ann Widdecome, Second Reading Debate, H.C. Hansard, 23 February 2004, Col. 96.

human level, trans persons will not find that the G.R.A. solves all their problems. For some, the Act presents as a dilemma.

If the aim of the G.R.A. is to contain any threat to the binary system of gender then here too that is realised only imperfectly. The consequence of the Government's strategy of focussing only on the public appearance of gender identity is that space is left for private otherwiseness. The operating assumption upon which the Act is founded is that gender is a social and psychic construction, and it is fluid. If this were not the case, how could gender be legislated for? It is true that the numbers involved, if vocal, are very small. This is not the end of gender as we know it. And it is true too that a trans person is not unlikely to feel distressed and (to be) victimised by his or her situation. The construction by some of trans persons as 'Transgender Warriors', the vanguard of a political movement to erase gender as binarism, is precisely that, a construction, an imposition by critical theorists. But this does not detract from the conceptual point, that transsexualism brings law's orthodox construction of gender inevitably into question. The shift in policy, from refusal to recognise to a limited form of recognition, cannot help but also be a shift from sex, biology and nature to gender, sociology and cultural construction. And here it is not merely the legal construction of trans persons which is at issue. Sex discrimination law as a whole, for example, now raises question of gender rather than sex discrimination. Transsexualism functions as metaphor or allegory, highlighting the metaphoric or allegorical qualities of 'female' and 'male' gender identity, the degree to which gender is always already a performance, and the potential flexibility or malleability of those terms. This is one reason why transsexualism is or should be a vital topic for all feminists. Another is that it requires all students of gender to rethink their own terms of reference, their own inclusions and exclusions, their own politics of gender, not sex, in the new age of fluidity.

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